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No. 01-1411

IN THE

Supreme Court of the United States

COMMONWEALTH EDISON CO.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS COMMONWEALTH EDISON CO., OMAHA PUBLIC POWER DISTRICT, SACRAMENTO MUNICIPAL UTILITY DISTRICT AND YANKEE ATOMIC ELECTRIC COMPANY*

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* While filed in the captioned petition, the Amicus requests that its brief be considered in the other three petitions (Case Nos. 01-1020, 01-1155 and 01-1398) as well. All parties have been served.

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I. INTEREST STATEMENT OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Many of the Chamber's members provide goods and services to, or purchase goods and services from, the United States under government contracts. The Chamber regularly advocates its members' views in Supreme Court and other appellate forums. It initiates and enters litigation involving issues of national concern to the American business community.

We write to address the interests of the government contracting community many of whose number are members of the Chamber. Our interest in critical government contracting issues has led to amicus presentations to the Court in the past not only in *United States v. Winstar Corp.* 518 U.S. 839 (1996) but also in other cases such as *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Few issues affecting contracting with the United States government are more fundamental to our members' interests than the very sanctity of those contracts. The seemingly narrow context of this case is wholly offset by the flagrant abuse here of the statutory process to amend, abrogate, and repudiate contract terms. The license given to the Executive

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber hereby affirms that no counsel for any party authored any part of this brief, and that no person or entity other than the Chamber and its legal affiliate, the National Chamber Litigation Center, Inc., provided financial support for its preparation or submission.

Branch and Congress by the Circuit decision transcends the abuse that this Court struck down in *Winstar*. *Winstar*, unfortunately left open, and clearly unresolved, some of the mechanisms to breach a contract upon which the government defends and the Circuit has allowed. We believe a significant clarification of the parameters of *Winstar* is critical at this time. This is a plea for the sanctity of contracts for those who would do business with the government. In this context we invoke this Court's admonition in *Winstar*: "We have also recognized, however, that "'[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.'" *Winstar*, 518 U.S. at 886 n.31 (quoting *Heckler v. Community Health Services. of Crawford Cty., Inc.*, 467 U.S. 51, 61 n. 13, (1984) paraphrasing Holmes, J., *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920)).

II. REASONS FOR GRANTING THE WRIT

A. THE UNIQUE NUCLEAR "BUSINESS" IS NOT A LICENSE FOR THE GOVERNMENT TO AMEND ITS CONTRACTS

The nuclear business in the United States is uniquely a pervasive creature of law and regulation. It is the proximate product of the efforts during World War II to create a nuclear weapon. The obvious ability of nuclear energy to provide power generation was not lost on the government and, under the Eisenhower administration, a program called "Atoms for Peace" was begun that had as its objective stimulating the development of commercial uses of nuclear energy, primarily in the development of commercial power generation. *Westinghouse Electric Corp. v. United States*, 598 F.2d 759 (3rd Cir. 1979).

Throughout, however, the government retained near total control over every aspect of the nuclear business. This

obsession with control was certainly justified by the national defense and safety risks inherent in virtually every aspect of the creation of nuclear energy, including the enrichment of fuel for purposes of power generation. But the government has been an uncertain partner in commercializing nuclear energy. It has, in many cases planned its participation poorly; it has changed its policy "mind" about activities critical to making commercial uses of nuclear energy cost effective and even feasible; and it has strung out the commercial power industry in determining costs, providing a consistent regulatory pattern for designs, safety, storage of spent fuel and nearly every other component of design and operation for which the government exercises near-absolute control. See, e.g., *NL Industries v. United States*, 12 Cl. Ct. 391 (Appendix) (1987), aff'd 839 F.2d 1578 (Fed. Cir. 1988).

Against this background, it is important to recognize that in virtually no other industry are the commercial participants so dependent on the government to "do the right thing." The regulatory process controls every aspect of the business, from cradle to grave; sources of fuel and the disposal of spent fuel and wastes are tightly controlled by the government. And nowhere is the government's control more absolute then in the contracting process. Not only are the contracts with the government in this enterprise contracts of adhesion, as are all government contracts, but here, the contracts are, literally, statutory contracts, their creation and terms having been prescribed to an extraordinary extent by statutes and implementing regulations. Gilbert A. Cuneo and Eldon H. Crowell, *Impossibility of Performance – Assumption of Risk or Act of Submission?*, 29 Law and Contemporary Problems: Government Contracts Part II, 531, 548-49 (1964). The authors conclude that "[c]onditions and clauses in a government contract are on a take-it-or-leave-it basis; there is no Freedom of choice." *Id.* at 549.

From this picture, the Circuit seemingly drew the conclusion that the petitioners were on notice that the terms of their contracts might change and that the government was entirely justified in unraveling the contracts retroactively. Thus, the court found that, not only were there no unmistakable terms of obligation, but, somehow, the contractors should have anticipated that their contracts would be reopened to address some additional consideration that the government concluded it desired but had purposefully omitted from the contracts.

We suggest to this Court that the Circuit reached an erroneous conclusion. It misconstrued the obligations of "regulatory dependence," and it improperly violated the sanctity of the contracts: Obligations of regulatory dependence are not a license for the government to abrogate its contracts. First, contracts of adhesion, generally, impose on the dominant party an obligation not to overreach the other contracting party and to assure that the terms and conditions are both clear and unchanging. Where, moreover, the government's dominant position is nearly absolute, we believe it has an enhanced duty of fairness. *Art Metal USA, Inc., v. Solomon,* 473 F. Supp. 1, 3 (D.C. 1978). In *Helene Curtis Industries v. United States*, 160 Ct. Cl. 437 (1963), Judge Oscar Davis wrote:

> Although it is not a fiduciary toward its contractors, the Government – where the balance of knowledge is so clearly on its side – can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word.

Id. at 444.

Here, "betrayal" may be replaced by "entrapment." "Silence" is represented by the government's intentional

failure to include its D&D costs in its contract negotiations with petitioners. The facts in this case demonstrate the following: (1) the government had operated the enrichment facilities for many years solely for purposes of national defense; (2) in the course of those operations it had contaminated the facilities, to some extent through its own negligence; (3) at the creation of the supposedly for-profit United States Enrichment Corporation (USEC), the government was well aware of the contamination, its need to remediate the facilities and the fact that including the cost of such remediation in the liabilities of USEC would make the creation of USEC a certain failure; (4) with this knowledge, the government retained the obligation of remediation in its creation of USEC and, the concomitant costs of such remediation, there being no means in law or equity to lay off such costs on anyone else; (5) starting in the 1970s, the government faced fierce price competition from foreign suppliers and could not possibly have competed successfully if its contracts had sought to impose liability for remediation costs on its customers; (6) the government testified before Congress that it omitted those remediation costs from the commercial enrichment contracts intentionally; (7) after inducing customers to purchase enriched uranium with promises of fixed prices, the government thereafter went to Congress and secured legislation that effectively increased the costs of those purchases by requiring these same customers to pay for the remediation services. These facts have, somehow, engendered the utterly despotic notion that, rather than owing duties to the contractor similar to parens patriae, the government can exercise an Orwellian power to twist funds from its contracting partners. The government here had a heightened obligation of fealty to those it had induced by contract into a relationship with it.

B. WINSTAR LAW IS UNFINISHED BUSINESS IN ADDRESSING THE GOVERNMENT'S RELATIONSHIP WITH ITS CONTRACTING COMMUNITY

It was not long after this Court's decision in *Winstar* that the concepts articulated therein were in serious trouble before the Federal Circuit. The ink was barely dry on *Winstar* when the Federal Circuit handed down its decision in *Yankee Atomic Electric Co. v. United States,* 112 F.3d 1569 (Fed. Cir. 1997), cert. denied, 524 U.S. 957 (1998). This was the precursor of the cases presently before this Court.

A major problem left unsolved in *Winstar* is the lack of parameters for the application of either the sovereign acts doctrine or its companion the unmistakability doctrine. The latter is particularly unmanageable. The application of these two doctrines is left uncertain and, apparently from the Circuit decision, not well understood on the basis of this Court's *Winstar* opinion.

Even before reaching the question of the application of these two doctrines, however, in the context of this case, the *Winstar* result finds additional strength. Here, there was a clear intent to enter into express contracts, a starting assumption that the government contested in *Winstar*. *Winstar* at 862. The importance of this fact is that there is an attendant merger presumption that all the terms intended by the parties are present in the subject instruments. Similarly, there is an unrebutted presumption that the contracts fully expressed their intended considerations, that is, they had complete mutuality. After *Winstar*, this is a case where the government simply breached its contracts by inducing Congress to pass a contract-specific law, the objective of which was abrogation.

Sovereign Acts is a concept that is applicable where the statute in question is intended to function as a "public and

general" law. *Horowitz v. United States*, 267 U.S. 458, 461 (1925). Stated otherwise, "[t]he United States as a contractor are not responsible for the United States as a lawgiver." *Deming v. United States* 1 Ct. Cl. 190, 191 (1865). But these statements do not inform particularly because it can be said that ALL statutes are "public and general." It has become clear, however, that the intended dichotomy has to do with the breadth of the statute. On the one hand a statute may be of broad expanse in intended application, such as in the case of general revenue taxation. Or, at the other extreme, it may intend to effect some specialized purpose that would limit its application to a narrow sector...which is perhaps previously the subject of other enactments. This is now understood to encompass the amendment of a previously enacted statutory program the effectuation of which is carried on by contract. About such statutory amendments to contracted programs, this Court warned in *Winstar* that "[l]egislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners." *Winstar* 518 U.S. at 902-903.

The clear suggestion here was that, if the intended focus of the legislation falls "substantially" on a contracted program, it will not meet the criteria for "public and general." It is not unfair to assume that this Court intended some linkage between a statute and an objective to modify a particularized prior government program undertaking, especially where the program's objectives are effectuated in the form of contracts. This kind of linkage classically self serves. Far more clearly even then the statute at issue in the *Winstar* case itself, the EPACT was intended to fall "substantially" upon the enrichment contracting partners...solely in fact.

The notion of umistakability appears to have meaning only if a statute first passes a "public and general test." This

is so because if a statute is singularly focused on a contracted program, it is not only not public and general, it bespeaks an actionable intent to breach the contracts. If it is necessary, however to reach unmistakability at all, we suggest that umistakability, applied to fixed terms contracts with the United States is an anachronism and should be abandoned expressly by this court. Our analysis starts with Madison's admonition, repeated by the trial court in *Winstar*:

> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

James Madison, *Property (1792),* reprinted in 6 The Writings of James *Madison* 101, 103 (Gaillard Hunt ed., 1906), quoted in *Winstar Corp. v. United States,* 25 Cl. Ct. 541, 553 (1992).

Nor does the concept of unmistakability find any home in the principal contract case precedents of this Court. The fundamental problem created by pinning the concept to a contract with fixed terms is that it makes the contract illusory. This Court stated in *Perry* that such a result is unacceptable:

> On that reasoning, if the terms of the government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the

> Congress can disregard the obligations of the government at its discretion, and that, when the government borrows money, the credit of the United States is an illusory pledge.

Perry v. United States, 294 U.S. 330, 350 (1935).

While the Court there was dealing with "money" there appears little distinction between the contracts in which the *Perry* borrowing took place and the contracts here. Both were contracts with fixed terms which established the reasonable expectations of the parties. See also *Murray v. Charleston*, 96 U.S. 432, 445 (1877) ("It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes to the destruction of it.")

And *Lynch v. United States,* 292 U.S. 571 (1934), is no different in its strict adherence to the preservation of the sanctity of contracts with the government. If anything *Lynch* presents a setting very close to the instant case:

> Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy, but an act of repudiation.

Lynch 292 U.S. at 580.

The *Lynch* court stated precisely the motive of the statute in the instant case. And there is nothing in this Court's decision in *Lynch* to suggest that the outcome was predicated on an express undertaking by the United States not to abrogate its obligations.

The application of "unmistakability" to fixed terms contracts turns the principles of contract law on their head,

even those applicable to the government as a contracting party. It is not the contractor who must beware of the absence of an umistakable rights provision in a contract in order to avoid an illusory result, it is the government that must put into a law enabling a contract or into the contract itself a reservation of a right to make changes in terms and conditions later. *Lynch*, 292 U.S. at 578, 579.

Indeed, the government does have regulations that reserve to it the right to make changes when such "changes" are desired. See, Federal Acquisition Regulation ("FAR") Part 43, Subpart 43.2 but such reserved authority is meaningfully limited to "changes" within the "scope" of the contract and does not include a unilateral right to change payment terms or the amount of revenue that can be generated from the contract. It is, moreover, accepted that absent even this limited reservation of a "changes" right, a material, unilateral imposition on contract terms would be a breach. *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982).[2] Similarly, the government, in terms prescribed by regulation, may avoid breaching its contracts by "terminating" them. (See, FAR Part 49. But, even here, the right to rely on a "termination" clause is limited. *See also*, *United States v. Speed*, 75 U.S. 77 (1868).

The history of government contracting demonstrates the government's understanding that it is obliged to contract for terms that will allow it to alter its obligations. This understanding is certainly consistent with this Court's several statements on the subject. This understanding is not consistent with the notion that the absence of such

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[2] For a period of years the government did have a statutory right literally to renegotiate the profit terms of its contracts. That right to "renegotiation" however, was engraved in an express law and in the contract terms themselves. *Lichter v. United States*, 334 U.S. 742 (1948).

reservations nevertheless suggests the presence of such rights of change. Yet this is the essence of "unmistakability" when applied to contracts with fixed terms. This Court should address this open issue the impact of which threatens the underpinnings of the Government's relationships with its contracting patrons.

C. MATERIAL SELF INTEREST SHOULD REQUIRE THE COST OF STATUTORY CHANGES TO BE BORNE BY THE GOVERNMENT

This Court has stated that: The greater the Government's self-interest ... the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence. *Winstar* 518 U.S. at 898.

Under these terms, it would be hard to imagine an act more dictated by pure self interest then one which legislated a change in contract terms to force a contracting party to clean up the government's self-made mess. There is no universe of considerations to add which suggests that the national good was at stake or even that the new statutory obligation was a quid pro quo for services rendered. Those services rendered were compensated fully under the terms of the contracts themselves. The obligation to remediate was one which the government had owned, prior to the contracts in issue, as a result of its operation of the enrichment facilities solely for purposes of national defense.

But the issue of self interest does not stop with this remarkable law mandating that a stranger to the mess clean it up. It is equally important to look back at the making of the contracts in the first place. As the Petitioners have described to this Court, the enrichment facilities were created singularly for purposes of national defense and operated on that basis for a number of years during which the contamination was

generated, in part by the government's own negligence. Then, the facilities were opened to commercial enrichment services. Why? The answer is very simple: the government was serving its (not the petitioners') interests thereby. It is clear that the operation of these facilities was extraordinarily expensive. It is also obvious that the facilities had considerable unused capacity.

The objective of providing commercial enrichment was simply to enlarge the operating base and thereby to spread the fixed and semi-variable operating costs over that larger base, making each unit of production thereby less expensive to the government. It follows that the government elected not to attempt to price the remediation costs into the contracts for the simple reason that the government's attempts to self serve by reducing its unit costs of production would have been lost.

The Circuit's decision vaguely suggests that the imposition of this statutory payment obligation "... would not be contrary to that party's reasonable expectations." This is entirely contrary to the realities of the then existing contracting environment. In addition, however, the analogy may properly be drawn to this Court's pronouncements relating to "investment backed expectations." *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). This exact analogy was drawn by this Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998), and was amplified by the Circuit in the instant case. *Commonwealth Edison Co.*, 1347-1349. In a contract setting, the expectations are far more easily defined then in the classic takings setting. The expectations may generally be found on the face of the contract, defined in the services to be provided and the price to be paid. For the Circuit, under such circumstances, to reach out beyond the contract and attempt to identify "reasonable expectations" that were plainly not part of the contract was sheer speculation; and it was profoundly wrong at that. The Circuit seemed not to

understand that the contract nexus set this case apart from its strained attempt to connect the Petitioners to their regulated environment.

The petitioners changed position in reliance on the terms of the contract: they abstained from alternative sources of the enrichment services the prices for which were certainly competitive. They relied on contemporaneous oral promises from their counterpart government officials. They relied on the knowledge that the contracts were negotiated in a competitive market place wherein the government was constrained to offer its best price. The "investment" that the petitioners made in the execution and performance of their obligations under the contract was contractually predicated on the "expectation" that the government would not abrogate the negotiated terms. It is clear that, had the Petitioners not changed their position in reliance on the terms of their contracts, they would have no liability under this statute. Arguably, the government would not have had this convenient base against which to relieve itself of the costs of contamination that it had itself generated.

The contrary view suggests a cynicism borne of the assumption that regulated industries members have no unimpeachable contract rights when dealing with their regulators and should be prepared for all manner of impositions. This is not ever the law in non-socialist democracies and here, it also seriously imposes upon a relationship that was initiated and fostered by the government over a period of five decades, always with the assumption that the contractor-Petitioners were materially dependant on the government adhering to its contracts and otherwise treating its nuclear energy partners fairly.

D. GRANTING CERTIORARI WILL ALLOW THIS COURT TO RESOLVE RETROACTIVITY ISSUES IMPORTANT TO THE GOVERNMENT'S CONTRACTING PARTNERS

As this Court held in the seminal case of *Horowitz:*

> Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. *** In this court the United States appear simply as contractors; and they are held to be liable only within the same limits that any other defendant would be in any other court.

Id. at 461 (emphasis added) (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)). Accordingly, the government may agree by contract to assume certain risks. When it does, the terms of its bargain will be enforced. *See Winstar*, 518 U.S. at 843; *Lynch,* 292 U.S. at 580; *Perry*, 294 U.S. at 353 ("[T]he right to make binding obligations is a competence attaching to sovereignty").

Nevertheless, the Federal Circuit in this case permitted the government to abrogate its contractual obligation to assume the risk of increased costs that the government assumed by virtue of its fixed price contracts. If the decision is allowed to stand, it will not only upset the expectations of Petitioners and the other utilities who entered into fixed price contracts with the government, but also the expectations of every other company or individual who has ever contracted with the government.

While Congress has broad authority to adjust the burdens of economic life, its powers are not unlimited. *See Eastern*

Enterprises, 524 U.S. at 523-529. For example, this Court has long recognized that the Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Moreover, "provisions affecting contractual or property rights [are] matters in which predictability and stability are of prime importance." *Id.* at 271. Because EPACT attaches new legal consequences to contractual relationships completed decades before its enactment, Congress has overstepped the bounds of its legislative authority. *Cf. United States v. Carlton*, 512 U.S. 26, 38 (1994) (O'Connor, J., concurring) ("In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment"). The Chamber submits that when Congress acts to repudiate the government's contracts, it is not entitled to the same degree of deference accorded Congress when it enacts economic legislation benefiting third parties.

By granting certiorari in this case, the Court will be able to resolve this issue – which is of grave importance but not addressed in either *Landgraf* or *Eastern Enterprises* – namely, what level of scrutiny applies where Congress has legislated for its own benefit.

Even applying the limited judicial scrutiny enunciated in *Eastern Enterprises,* however, EPACT fails to meet the constitutional challenge. The plurality and concurring justices in *Eastern Enterprises* agreed that the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act") was unconstitutional as applied to Eastern Enterprises. If the Coal Act is unconstitutional, there can be no doubt that EPACT is also unconstitutional.

In *Eastern Enterprises* the plurality determined that Coal Act was unconstitutional as applied to Eastern because the

Coal Act imposed a severe retroactive liability on Eastern that Eastern could not have anticipated and because the liability imposed on Eastern was substantially disproportionate to Eastern's experience. 524 U.S. at 528-537. As such, the plurality concluded that the Coal Act violated "fundamental principles of fairness underlying the Takings Clause." *Id.* at 537. As shown by Petitioners' briefs, EPACT imposes as severe, if not more severe, retroactive liability on utilities than what the Coal Act sought to impose on Eastern.

Justice Kennedy agreed that the Coal Act was unconstitutional, but based his opinion on the Due Process Clause, not the Takings Clause. *Id.* at 539-547. The dissent agreed that the question of retroactivity should be addressed under the Due Process Clause, but found that the statute was constitutional. The dissent concluded that it was not fundamentally unfair and unjust to require Eastern to pay the health care costs of its own retired employees because: (1) the statute only imposed liability on Eastern for miners which Eastern itself employed; (2) Eastern benefited from the miners labor and created the health risks of the miners; and (3) Eastern helped create the miners' expectations of continued future health benefits. 524 U.S. at 559-567.

First, in contrast, EPACT imposes liability for decontamination and decommissioning costs associated with the government's national defense programs. Second, Petitioners did not create the conditions requiring decontamination and decommissioning. As noted above, the government contaminated the facilities while enriching uranium for its own use and, in part, because of its own negligence. Moreover, Petitioners exercised no control over the facilities or the enrichment process. Third, Petitioners and the other utilities played no part in the government's expectation that it would be reimbursed by its contacting partners for these costs. In fact, because the contracts at issue

were fixed price contracts, the risk of increased costs was borne by the government as the seller of the services. *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1402 (9th Cir. 1993). Thus, even assuming that the more deferential standard of review applies, there can be no doubt that EPACT is unconstitutional. In sum, the Federal Circuit has given Congress a virtually unrestricted license to enact wholly retroactive legislation and for the singular purpose of improving the government's position in its pre-existing contracts. Given that the government, not Petitioners, created the problems addressed by EPACT, the imposition of retroactive liability on Petitioners is "arbitrary and irrational." As such, it cannot be sustained under the Due Process Clause.[3]

The Federal Circuit's decision invites Congress retroactively to impose price increases on many of the Chambers members and the government's other contracting partners.[4] Contractors must, however, know with a reasonable degree of certainty what risks they are undertaking

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[3] While the facts of *Eastern Enterprise* were susceptible of the different interpretations that led to the different conclusions reached by Justice Kennedy and the dissenting justices, the facts of this case are not. The facts clearly show the government entered into fixed price contracts and then acted in its own singular self-interest by shifting the financial burden of the decontamination and decommissioning costs associated with its operation of enrichment facilities from the public to the government's contract partners.

[4] By granting Congress the authority to disrupt settled expectations long after the transactions at issue have closed, the Federal Circuit's decision could impact not only the expectations resulting from the type of fixed-price contracts at issue here, but also the expectations derived from the government's acceptance of certain risks set forth in the assumption-of-risk clauses that the government has adopted as part of the FAR. See, for example, FAR, Part 50.

in agreeing to contract with the government so that those risks can be addressed appropriately. The failure by the government to account for these risks contractually compels the contractors to include substantial contingency costs in their pricing of contracts and increases greatly the ultimate costs to the government. *Boyle*, 487 U.S. at 507-512. This Court should grant certiorari to correct the grave errors by the Federal Circuit.

E. THE PERVASIVE REGULATORY ENVIRONMENT REQUIRES STRICT ADHERENCE BY THE UNITED STATES TO ITS CONTRACT OBLIGATIONS

Substantial reliance for its decision is placed by the Circuit on the fact that the context of this case included a highly regulated business. It should have been the "reasonable expectation," said the Circuit, that the government would return and demand that the Petitioners participate in the cleanup of the government's contaminated facility. These conclusions, ill-founded in the reasoning and case law cited by the Circuit, are a fundamental denial of the law of contracts and, furthermore are even inconsistent with environmental law.

No case, not one, even suggests that an owner of a contaminated facility may, without a prior contract reservation, visit upon its former customers the costs of remediation of the facility. And, when the government is involved, this is also the case. Thus, where the government has been a predominant customer and has exercised plenary control even over a privately owned facility, the Circuits have found that the government is liable, at least as an "arranger." *See, FMC Corp. v. United States Department of Commerce*, 297 F.3d 833 (3d Cir. 1994); *cf. United States v. Shell Oil Co.*, 2817 F.3d 812 (9th Cir. 2002), Petition for rehearing en banc, pending).

But the more critical error of the Circuit lies in its pointed sidestepping of the contract relationship in concluding that pervasive regulation is the natural predicate to breaching the four walls of a contract. Such a notion is not supported by any case citation or logic path suggested by the Circuit. The cases imported by the Circuit for its analysis simply were not contract cases in which the government, as a contracting party, directly or indirectly either assumed or projected the costs of remediation. To the contrary, the analysis and the cases cited stand only for the unremarkable proposition that one cleans up one's own mess. In the instant case, the "mess" was not only owned exclusively on the government, it was created exclusively by the government. What is quite remarkable in this analysis is the suggestion that the Petitioners' generic admission that their industry always carried a D&D burden could be applied to facilities that were never owned nor controlled by the industry. There is no doubt that this industry is well aware of its remediation burdens. Those burdens are substantial enough when viewed simply from the perspective of the facilities that the industry owns and controls. But, those facts hardly suggest that the industry should have anticipated assuming the government's burden too.

III. CONCLUSION

The capstone on these poorly constructed notions by the Circuit is its failure even to acknowledge the presence of contractual agreements in which the government, as a contracting party, had purposefully excepted from the contract price and the negotiations for such contracts any undertaking to participate in the D&D. This fact requires us to return to the basic premise of these Petitions: the government is bound by its contracts, fully, as would be any other contracting party. Under the facts in this case, it is hardly necessary even to reach the subtle concepts of sovereign acts or unmistakability because the objectives

which those notions would reach, the imposition of D&D costs on the contracting Petitioners, were actually considered and rejected in the making of the contracts themselves. At its root, this case involves little more than the sanctity of a contract in the face of an after-discovered effort to entrap the private contracting parties in a poorly orchestrated effort to rewrite the contracts include obligations that would have been rejected in the first place.

To the extent that this Court's decision in *Winstar* appeared to leave open a window to enable the government to pass contract and program specific laws reopening purposefully fixed terms, that window should be closed. There was no material public interest served here that would warrant a precedent disturbing the sanctity of these contracts; this precedent should not be allowed to stand.

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